In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-589

GUY DI VIAIO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that evidence obtained by wire interception was improperly admitted at his conspiracy trial because the application for a court order authorizing the interception was approved by the Acting Attorney General of the United States. He further contends that he was improperly sentenced to consecutive prison terms on two conspiracy counts.

Petitioner was tried alone before a jury in the United States District Court for the District of New Jersey. He was convicted of two counts of conspiring to possess and distribute controlled substances, in violation of 21 U.S.C. 846. The first count charged petitioner and defendants Class, Marino, Carroll,

Jasper, Paul, and Ashad with conspiracy to possess and distribute heroin and cocaine. The second count charged petitioner and defendants King, Marino, Cutler, Baisch, and Novick with conspiracy to possess and distribute phencyclidine. The bulk of the government's case consisted of testimony from an undercover narcotics agent of the Drug Enforcement Administration, Vincent DeStefano, and telephone conversations recorded pursuant to court orders issued under the authority of 18 U.S.C. 2510, *et seq.* The applications for the court orders were approved by Richard Kleindienst who was, at the time, Acting Attorney General of the United States (Affidavit of Mr. Kleindienst, Pet. App. B, pp. 3a–4a).

Petitioner was sentenced to ten years' imprisonment and five years' parole on count 1, and five years' imprisonment and two years' parole on count 2, the sentences to run consecutively. The court of appeals affirmed (Pet. App. A, pp. 1a–2a).

1. Petitioner contends (Pet. 6–7) that the Deputy Attorney General, while serving as Acting Attorney General during a vacancy in that office (see 28 U.S.C. 508(a)), is without power under 18 U.S.C. 2516(1) [1] to authorize an application for a court order permitting a wire interception. Although the Deputy Attorney General is not specifically named in Section

[1] 18 U.S.C. 2516(1) provides in pertinent part: "The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant * * * an order authorizing or approving the interception of wire or oral communications * * *."

2516(1), he is appointed by the President, by and with the advice and consent of the Senate (28 U.S.C. 504), and is therefore "responsive to the political process" (*United States* v. *Giordano*, 416 U.S. 505, 520). When the office of the Attorney General is vacant, the Deputy Attorney General exercises "all the duties of that office" (28 U.S.C. 508(a)) and is the "senior officer in the Department" (*United States* v. *Giordano, supra*, 416 U.S. at 521). The objective of 18 U.S.C. 2516(1)—to "centralize and limit" the authority to approve wiretap applications (416 U.S. at 523)—is fully satisfied when the application is personally approved by the Deputy Attorney General in his capacity as Acting Attorney General. *United States* v. *Curreri*, 363 F. Supp. 430, 434 (D. Md.); *United States* v. *Lucido*, 373 F. Supp. 1142, 1145 (E.D. Mich.). See also *United States* v. *Pellicci*, 504 F. 2d 1106, 1107 (C.A. 1), certiorari denied, 419 U.S. 1122.

United States v. *Acon*, 513 F. 2d 513 (C.A. 3), on which petitioner relies, is not to the contrary. The authorization order there had been signed by an Acting Assistant Attorney General "who ha[d] not been appointed by the President and confirmed by the Senate" and who therefore, in the court's view, did not "meet the Supreme Court's test of political responsiveness" (513 F. 2d at 516).[2]

2. Petitioner contends (Pet. 7–8) that the consecutive sentences imposed by the district court were

[2] The court in *Acon* concluded in any event that suppression was not required because it found that, while the authorization order had been signed by an Acting Assistant Attorney General, the Attorney General had personally approved the application (513 F. 2d at 516–519).

improper because "[t]he record in this case would support the determination that there was but one conspiracy which was concerned with different controlled substances" (Pet. 8). The evidence, however, established the existence of two discrete conspiracies involving different agreements among different persons at different times. That petitioner, an active participant in both conspiracies, may have been "interested in all controlled substances" (Pet. 5) does not mean that the separate conspiracies he entered into in furtherance of his "interests" amount only to a single crime.

Petitioner's assertion (Pet. 8) that the district court's instructions permitted the jury to find a single conspiracy involving separate drugs is groundless. The single sentence of the instructions on which petitioner relies (see Pet. 5) does not imply that the jury may find guilt as to both counts if it determines that petitioner reached an agreement with any of the persons named in *either* count. The point of the instruction, viewed in context,[3] is simply that, with

[3] The sentence must read together with the preceding sentence (C.A. App. 591a): "Thus, when I say the Government must prove that the defendant entered into an illegal agreement, I do not mean that he must be shown to have met and talked with each of the other alleged conspirators, nor is it necessary that the Government prove that each and every one of the other named individuals actually agreed to participate in a common undertaking. It is sufficient if the Government proves that the defendant presently before you came to an express or implied meeting of the minds with any one of the other alleged conspirators that they would commit such acts as are alleged in Counts 1 and 2 of the indictment."

respect to each count separately, the essential element of an agreement to do an unlawful act may be satisfied by proof that petitioner made such an agreement with any of the individuals named in that count. The court left no doubt that the two counts required separate consideration. It stated (C.A. App. 606a):

> Now, you will keep in mind during the course of your deliberations that there are two counts contained in the indictment, Counts 1 and 2. Each of these counts is to be judged by you separately. You may find the defendant guilty of both counts or not guilty of both counts or guilty of one and not guilty of the other, depending upon what you as the sole judges of the facts find those facts to be.

Petitioner's counsel stated at the completion of the instructions that "[t]he defense has no exceptions to the charge" (C.A. App. 609a).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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